Dalyn Kev v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–223–09 OF 2013
AZIAH ALI, ROHANA YUSUF AND TENGKU MAIMUN JJCA
18 FEBRUARY 2015

Criminal Law — Dangerous drugs — s 39B(2) — Trafficking — Trafficking in 2,106.7g methamphetamine — Appeal against conviction and sentence — Drugs found hidden in soles of shoes inside appellant's locked luggage at KLIA — Whether appellant had custody and control of luggage — Whether prima facie case of trafficking was made out based on amount of drugs and manner drugs were concealed — Whether disparity in weight of drugs affected prosecution's case — Whether third party DNA profiles found on clothing inside luggage affected prosecution's case — Whether absence of positive finger print evidence affected prosecution's case — Whether statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 rebutted — Whether conviction safe

The appellant was detained at KLIA after drugs were found in her luggage (exh P12). Exhibit P12 had the luggage tag in the name of the appellant and it was locked. The appellant unlocked the luggage which contained three pairs of shoes/sandals and numerous women's apparels. Upon prising the soles of two pairs of the shoes, PIKK Ramish ('PW5') who was on duty at the custom's scanning machine at KLIA recovered a yellow coloured packet from each of the soles. A packet containing substance was also recovered by PW5 in the layers of the hardboard of exh P12. The substances recovered were later confirmed by the chemist (SP3) to be methamphetamine. The appellant was charged for trafficking in 2,106.7g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant denied any knowledge of the drugs found in exh P12. She stated that she had gone to Dhaka, Bangladesh on the instructions of her boyfriend to collect document for purposes of her employment in Malaysia and for her boyfriend's business in diamond. In Dhaka, her boyfriend's friend gave her the luggage P12. The items in P12, according to the appellant did not belong to her but to a Bangladeshi woman. Having invoked the presumption under s 37(d) of the DDA, the learned trial judge ('judge') went on to find that the element of trafficking had been proved by the prosecution under s 2 of the DDA. The judge rejected the defence and convicted and sentenced the appellant to death. The appellant appealed against conviction and sentence on the grounds that: (a) the appellant had no knowledge of the drugs; and (b) that there was a gap in the prosecution's case. It was submitted that mixed DNA was found on the clothing recovered from P12, that there was disparity in the weight of the drugs and that the appellant's fingerprint was absent on P12.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The appellant had the custody and control of exh P12 and applying s 37(d) of the DDA, the appellant was deemed to have knowledge of the drugs found hidden behind the hardboard of exh P12 and inside the soles of the shoes. Looking at the manner the drugs were concealed and in view of the large amount of the drugs recovered, a prima facie case of trafficking had been made out under s 2 of the DDA (see para 15).

(2) Notwithstanding the fact that PW5 did not state in his evidence that he weighed the drugs, the evidence of the investigating officer, PW6 disclosed that it was PW5 who did the weighing while the readings were recorded by PW4. The evidence further disclosed that the weighing and the recording of the weight was done in the presence of PW6. There was no challenge by the defence on this aspect of the evidence of PW6. In any event, the judge had considered the issue of disparity in the weight of the drugs (see paras 17–18).

(3) The issues that the clothing recovered from exh P12 had mixed DNA profiles of which the appellant was one of the contributor; that the shoes did not belong to the appellant and that there was no positive finger print of the appellant found on the luggage did not create a gap and did not affect the prosecution's case given the finding that the appellant had custody and control of the luggage P12 and was deemed to have knowledge of the drugs found therein pursuant to s 37(d) of the DDA (see para 20).

(4) The judge had extensively dealt with and had properly evaluated the defence. Guided by the principles of wilful blindness enunciated in *Hon Bon Tong v Public Prosecutor* and *Samad Mohamed Sulthan v Public Prosecutor* , the judge found that the substance of the defence posited by the appellant that she had no knowledge of the drugs was a mere denial (see para 21).

(5) The appellant had failed to cast a reasonable doubt on the prosecution's case and had failed to rebut, on the balance of probabilities, the statutory presumption invoked against her under s 37(d) of the DDA (see para 22).

[Bahasa Malaysia summary

Perayu ditahan di KLIA selepas dadah dijumpai di bagasinya (eksh 12). Ekshibit P12 mempunyai teg nama perayu dan berkunci. Perayu membuka bagasinya yang mengandungi tiga pasang kasut/sandal dan beberapa pakaian wanita. Setelah mencungkil tapak kedua-dua tapak kasut, PIKK Ramish ('PW5') yang bertugas di mesin pengimbas kastam di KLIA mendapati paket berwarna kuning daripada tapak kasut itu. Satu paket yang mengandungi bahan juga ditemui oleh PW5 dalam lapisan daripada gentian keras daripada eksh P12. Bahan-bahan dijumpai kemudiannya disahkan oleh ahli kimia (SP3)

adalah methamphetamine. Perayu didakwa kerana mengedar 2,106.7g methamphetamine, suatu kesalahan yang boleh dihukum di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Perayu menafikan apa-apa pengetahuan tentang dadah yang dijumpai dalam eksh P12. Dia menyatakan bahawa dia telah pergi ke Dhaka, Bangladesh atas arahan teman lelakinya untuk mengambil dokumen bagi tujuan pekerjaannya di Malaysia dan untuk perniagaan berlian teman lelakinya. Di Dhaka, teman lelakinya memberikannya bagasi P12. Item dalam P12, menurut perayu bukan kepunyaannya tetapi seorang wanita warganegara Bangladesh. Dengan menggunakan anggapan di bawah s 37(d) Akta, hakim perbicaraan yang bijaksana ('hakim') mendapati elemen pengedaran telah dibuktikan oleh pendakwaan di bawah s 2 ADB. Hakim menolak pembelaan dan menyabitkan dan menghukum perayu dengan hukuman mati. Perayu merayu terhadap sabitan dan hukuman atas alasan bahawa: (a) perayu tidak mempunyai pengetahuan terhadap dadah; dan (b) terdapat jurang dalam kes pendakwaan. Adalah dikemukakan bahawa DNA bercampur yang didapati pada pakaian yang didapati daripada P12, bahawa terdapat perbezaan dalam berat dadah dan bahawa cap jari perayu tidak terdapat pada P12.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Perayu mempunyai jagaan dan kawalan terhadap eksh P12 dan menggunakan s 37(d) ADB, perayu telah dianggap mempunyai pengetahuan tentang dadah yang dijumpai tersembunyi di belakang gentian keras daripada eksh P12 dan di dalam tapak kasut. Melihat kepada cara dadah itu disembunyikan dan memandangkan jumlah besar dadah dijumpai, kes prima facie pengedaran telah dibuat di bawah s 2 DDA (lihat perenggan 15).

(2) Walau apa pun hakikat bahawa PW5 tidak menyatakan dalam keterangannya bahawa dia menimbang dadah, keterangan pegawai penyiasat itu, PW6 mendedahkan bahawa ia adalah PW5 yang melakukan timbang manakala bacaan direkodkan oleh PW4. Keterangan yang dinyatakan selanjutnya bahawa berat dan rekod berat yang dilakukan di hadapan PW6. Tidak ada cabaran oleh pihak pembelaan pada aspek keterangan PW6. Dalam apa jua keadaan, hakim telah mengambil kira isu perbezaan dalam berat dadah (lihat perenggan 17–18).

(3) Isu-isu pakaian didapati daripada eksh P12 mempunyai profil DNA campuran yang perayu adalah salah satu penyumbang; bahawa kasut bukan milik perayu dan bahawa tidak ada cap jari positif perayu yang ditemui pada bagasi itu tidak mewujudkan jurang dan tidak menjejaskan kes pendakwaan dengan dapatan bahawa perayu mempunyai jagaan dan kawalan P12 bagasi dan telah disifatkan mempunyai pengetahuan

A mengenai dadah yang terdapat di dalamnya menurut s 37(d) ADB (lihat perenggan 20).

(4) Hakim telah secara meluas menangani dan menilai pembelaan dengan betul. Berpandukan prinsip kebutaan sengaja yang dinyatakan dengan jelas dalam *Hon Bon Tong v Public Prosecutor* dan *Samad Mohamed Sulthan v Public Prosecutor*, hakim mendapati isi pembelaan yang dikemukakan oleh perayu bahawa dia tidak mempunyai pengetahuan tentang dadah adalah penafian semata-mata (lihat perenggan 21).

(5) Perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan gagal mematahkan, atas imbangan kebarangkalian, anggapan statutori yang dipohon terhadapnya di bawah s 37(d) ADB (lihat perenggan 22).]

Notes

For cases on s 39B(2), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 665–681.

Cases referred to

Hon Bon Tong v PP [2010] 5 CLJ 240, CA (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
Samad Mohamed Sulthan v PP [2013] 4 MLJ 7; [2012] 1 LNS 819, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(2)

Appeal from: Criminal Trial No 45A-101–05 of 2012 (High Court, Shah Alam)

Suzanawati bt Ismail (Suzana Ismail & Partners) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged at the High Court Shah Alam for trafficking in 2106.7g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). She was convicted and sentenced to death.

[2] We heard her appeal against conviction and sentence, at the end of which we unanimously dismissed the appeal. We now provide our reasons for the said decision.

[3] Briefly, the prosecution's case was that on 21 December 2011 at about 4am, PIKK Ramish a/l Manikam ('PW5') who was on duty at the custom's scanning machine at KLIA, saw the appellant, a Cambodian, exiting the carousel area. The appellant had with her a brown luggage with roller (exh P12) and a handbag (exh P17). She caught the attention of PW5 as 'Selalu penerbangan dari Dhaka adalah 90% adalah warga dari Bangladesh. Saya nampak kelainan kerana OKT menaiki penerbangan ini.'.

[4] The appellant was directed to scan the bags. Exhibit P12 had the luggage tag in the name of the appellant and it was locked. The scan, which was manned by PK Mohd Faisal Che Mohd Noor ('PW4') revealed dark green images inside exh P12. The appellant was directed by PW5 to open P12. The appellant took out a key from her handbag to unlock the luggage.

[5] Inside P12, there were three pairs of shoes/sandals. PW5 found that the soles of two out of the three pairs contained traces of gums. Upon prising the soles using 'kuku kambing', PW5 recovered a yellow coloured packet from each of the soles of two pairs of shoes. Other items recovered from exh P12 were numerous women's apparels. A packet containing substance was also recovered by PW5 in the layers of the hardboard of exh P12. The substances recovered from the soles of the shoes and from the hidden layer of the hardboard were later confirmed by the chemist (SP3) to be methamphetamine which formed the subject matter of the charge.

[6] The learned trial judge found that the prosecution had made out a prima facie case against the appellant. The appellant was called upon to enter her defence.

[7] In her evidence given under oath, the appellant denied any knowledge of the drugs found in exh P12. She stated that she had gone to Dhaka, Bangladesh on the instructions of her boyfriend to collect document for purposes of her employment in Malaysia and for her boyfriend's business in diamonds. In Dhaka, her boyfriend's friend gave her the luggage P12. Although she had a look inside the luggage when it was given to her, the appellant stated that she did not conduct a thorough examination of the items found in the luggage, in particular the soles of the shoes and behind the hardboard of the luggage. The items in P12, according to the appellant did not belong to her but to a Bangladeshi woman.

[8] The learned trial judge rejected the defence, hence the conviction and sentence.

A THE APPEAL

[9] Learned counsel for the appellant raised two grounds of appeal, namely:

(a) that the appellant had no knowledge of the drugs; and

B (b) that there was a gap in the prosecution's case.

[10] In submitting that the appellant had no knowledge of the drugs found in P12, learned counsel submitted that the shoes containing the drugs can be easily passed off as ordinary shoes and given that PW5 had to use some C equipment to open the hardboard of the luggage and to prise the shoes, it would be impossible for the appellant to know what was inside the bag and inside the soles of the shoes.

D **[11]** On the second ground, learned counsel submitted on the mixed DNA found on the clothing recovered from P12; the disparity in the weight of the drugs and on the absence of the appellant's finger print on P12.

[12] Having perused the grounds of judgment and the appeal records, we E found no merits in the grounds canvassed by learned counsel.

[13] On the issue of knowledge, the learned trial judge had stated that (*rekod rayuan Jld* 3: pp 315–316):

F To prove knowledge and possession, the learned TPR sought to invoke the deeming provision of the same under s. 37(d) of the DDA which provides that '... *any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug* ...' (Emphasis added.)

G On the facts and evidence and having succeeded in proving that the accused was having the said luggage under her custody and control, I have no doubt that the said deeming provision was applicable and could properly be invoked against the accused — see *Ibrahim Mohamad & Anor v PP* [2011] 4 CLJ 113; *PP v Tan Tatt Eek & Anor Appeal* [2005] 2 AMR 353.

H In such event the accused is deemed not only to be in possession of the said drugs but is also deemed to have knowledge of the nature of the said drugs until the contrary is proved. The said statutory presumption granted a dispensation to the prosecution from the obligation to prove knowledge on the part of the accused of the nature of the said drugs either by way of direct evidence or by way of I interferences of proved facts.

On account that the said presumption was applicable and could properly be invoked against the accused, it is thus my unequivocal finding that the accused was indeed having in his (*sic*) possession the said incriminating exhibits at the material time.

[14] Having invoked the presumption under s 37(d), the learned trial judge went on to find that the element of trafficking had been proved by the prosecution under s 2 of the Act.

[15] We agreed with the finding of the learned trial judge that the appellant had the custody and control of exh P12 and that applying s 37(d), the appellant was deemed to have knowledge of the drugs found hidden behind the hardboard of exh P12 and inside the soles of the shoes. We further agreed with the learned trial judge that looking at the manner the drugs were concealed and in view of the large amount of the drugs recovered, a prima facie case of trafficking had been made out under s 2 of the Act. We found that the learned trial judge had correctly appreciated the facts and the law as enunciated in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 and *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194. In the circumstances, we found no reason to intervene with the finding of the learned trial judge on the issue of possession.

[16] The second ground of appeal was in relation to the exhibits recovered from the appellant. On the drug exhibits, learned counsel's complaint was that not only was there disparity in the weight of the drugs given by PW3 and PW5, but that there was no evidence from PW5 that he had weighed the drugs.

[17] Notwithstanding the fact that PW5 did not state in his evidence that he weighed the drugs, the evidence of the investigating officer, PW6 disclosed that it was PW5 who did the weighing while the readings were recorded by PW4. The evidence further disclosed that the weighing and the recording of the weight was done in the presence of PW6 (*rekod rayuan Jld* 1: pp 97–98). There was no challenge by the defence on this aspect of the evidence of PW6.

[18] In any event, the learned trial judge had considered the issue of disparity in the weight of the drugs. At *rekod rayuan Jld* 3: pp 324–325, the learned trial judge said:

> ... PW-3 stated that the weighing machine she used to weigh the incriminating exhibits was calibrated and was done on scheduled basis. Whereas PW-6 said that the balance used to weigh the same was an electronic balance which was never calibrated. The learned TPR submitted that this was the explanation given to account for the disparity in the gross weight of the exhibits. I am with her on account that, to borrow the statement of *Hasbala Mohd Sarong* (supra), '... the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police and the chemist department ...'. It is obvious that apart from the fact that the balance used by PW-3 was properly calibrated, a perusal of PW-3's testimony also showed the difference in the methods she employed to get the gross weight of the said exhibits as compared to that employed by PW5.

[19] We found no reason to disturb the above finding of the learned trial judge.

[20] Learned counsel had also raised the issue that the clothing recovered from exh P12 had mixed DNA profiles of which the appellant was one of the contributor (*rekod rayuan Jld* 4: p 478); that the shoes did not belong to the appellant and that there was no positive finger print of the appellant found on the luggage. In our view, those issues did not create a gap and did not affect the prosecution's case given the finding of the learned trial judge that the appellant had custody and control of the luggage P12 and was deemed to have knowledge of the drugs found therein pursuant to s 37(d) of the Act.

[21] Further, we found that the learned trial judge had extensively dealt with and had properly evaluated the defence. Guided by the principles of wilful blindness enunciated in *Hon Bon Tong v Public Prosecutor* [2010] 5 CLJ 240 and *Samad Mohamed Sulthan v Public Prosecutor* [2013] 4 MLJ 7; [2012] 1 LNS 819, His Lordship found that the substance of the defence posited by the appellant that she had no knowledge of the drugs was a mere denial based on the following reasons (*rekod rayuan Jld* 3: pp 357–366):

> 1. The accused claimed to be an innocent carrier. She was merely asked to bring the said luggage to Malaysia not knowing there were drugs hidden inside. ...
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> ... The accused was asked to bring/carry the luggage to Malaysia in the most suspicious circumstances. She was only asked by her boyfriend to bring to Malaysia documents relating to her employment in Malaysia and documents relating to her boyfriend's diamond trade. However she was also asked to change her luggage with the luggage provided by her handlers. When she enquired the need to change the luggage, she was told that she was not allowed to bring 2 luggages at the airport. When she asked further, she was told not to ask further and to just bring the luggage to Malaysia. She was further informed that she will not get the job in Malaysia if this luggage was not taken to Malaysia. Her boyfriend had persistently phoned her to bring the said luggage to Malaysia and was told that the luggage contained clothings belonging to his friend, the Bangladeshi woman. She saw her clothings and belongings being transferred into the said luggage. There were also shoes and clothings belonging to the Bangladeshi woman who told her that she would also be coming to Malaysia and will collect her clothings from her in Malaysia.
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> The circumstances under which she was given the luggage to bring it to Malaysia enumerated above must have raised a lot of suspicions. ... She should thoroughly investigate the said luggage. The key to luggage was with her. ... All the more so when she was initially asked by her boyfriend to bring back only the said documents and nothing else. ...
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> (ii) The accused's conduct in not questioning the need to change her luggage; ... in not questioning the need for the Bangladeshi woman to ask her to bring her clothings and shoes to Malaysia in the said luggage and collect the same from her (the accused) in Malaysia when she herself is also coming to Malaysia at a later date; ...

(iii) The accused testified that the Bangladeshi woman is fat, taller and bigger than her size and the cloths belonging to the Bangladeshi are bigger in size than hers. In court she picked from the luggage the cloths belonging to her and the cloths belonging to the Bangladeshi. The sizes of the cloths were then compared. I found all the cloths to be more or less of similar sizes. The 2 pairs of shoes, exhibit P-10 (1-4) (both pairs were sandals actually) were also worn by the accused in court. It fitted rather nicely on her feet. The excess in size is not remarkable though. ...

(iv) The accused testified that she ... worked in bars and prostituted herself. She was desperate to seek employment in Malaysia to get out of her rotten life. She met her saviour, Alfa, while jogging at 3.00 a.m!. This was about 3 months prior to her arrest in KLIA. He used to provide her money. She fell in love almost immediately by any reckoning and totally trusted him. She also believed that Alfa could get her a job in Malaysia. But Alfa directed her to go to Bangladesh to get the documents to enable her to work in Malaysia. She obliged. Now, this makes no complete sense. The logical thing for her to do is to go to the Malaysian Consulate to get the work permit ... She could not have been that naive to believe Alfa and in fact went to Bangladesh to get the documents to enable her to work in Malaysia.

...

The conduct of the accused upon receiving the said documents in Bangladeshi is equally baffling. She accepted it and placed it inside her handbag, exhibit P-17. She did not check and examine the documents. She came all the way from Cambodia to Bangladesh to specifically take the documents and bring it to Malaysia but did not see it fit to ascertain whether the documents she had received were in fact the documents needed to get the job she craved for. ... Additionally the Customs witnesses in particular PW-5 and PW-6 makes no mention at all about the recovery of documents relating to the accused's employment in Malaysia or the diamond trade inside the accused's handbag, exhibit P17.

In my view her testimony relating to her forays to Bangladesh to collect the said documents and the events thereafter upon receiving the documents to be unbelievably incredible. In all the circumstances of the case, this is another red herring from the accused. She knew exactly what her mission/purpose was in going to Bangladesh before coming to Malaysia i.e. to bring the said luggage containing the said drugs and thereafter trafficked in the same. ....

[22] We found that the learned trial judge had not erred in law or in fact in his evaluation of the defence and we agreed with the conclusion made by the learned trial judge that the appellant had failed to cast a reasonable doubt on the prosecution's case and had failed to rebut, on the balance of probabilities, the statutory presumption invoked against her under s 37(d) of the Act.

[23] We accordingly dismissed the appeal. The conviction and sentence of the High Court was affirmed. It was our unanimous view that the conviction of the appellant was safe.

A *Appeal dismissed and conviction and sentence affirmed.*

Reported by Kanesh Sundrum

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